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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1930

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Western District of Missouri (R. 7–9) is reported in 28 F. (2d) 510. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 9–16) is reported in 35 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 3, 1929. (R. 16–17.) The petition for certiorari was filed January 3, 1930. Certiorari was granted February 24, 1930. (R. 18.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Should the value of real property situated in the State of Missouri be included in the measure of the gross estate of a decedent who died the owner thereof, under the provisions of Section 402 of the Revenue Act of 1918?

STATUTES INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 28–40.

STATEMENT

The following is a summary of the facts as alleged in the petition filed in the District Court and admitted by demurrer (R. 4):

On March 8, 1920, William H. Harrelson, of Kansas City, Missouri, died testate. At the time of his death he owned real estate situated in that state which then had a total value of $269,730. (R. 1, 2.) The respondents were the sole beneficiaries and distributees under his will. (R. 1.)

In the Federal estate tax return his executors included in the gross estate the value of this real property and reported a net estate of $2,137,204. (R. 2.) The Commissioner of Internal Revenue made an audit of the return, as the result of which the net estate was determined to be $2,279,068.28, including real estate valued at $269,730. The ex-

ecutors paid the estate tax of $200,569.58 assessed on this return, with interest. (R. 2.)

Thereafter the executors filed a claim for refund, alleging that under the laws of the State of Missouri real property owned by a decedent at the time of his death was not subject to the payment of the expenses of the administration of his estate, and hence that the value of the real property owned by the decedent at the time of his death was not properly included in his gross estate. The claim was rejected by the Commissioner. (R. 2.)

The petition demanded judgment for the sum of $37,762.20, with interest at the rate of 6% per annum from July 24, 1922. (R. 3.) The Collector demurred to the petition. (R. 4.) The District Court overruled the demurrer, and on December 14, 1928, as the Collector declined to plead further, it entered judgment for the plaintiffs for $37,762.20 plus interest. (R. 5.) The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment (R. 16–17). This Court granted certiorari on February 24, 1930. (R. 18.)

Both of the courts below held in effect that real estate could not be included in computing the value of the gross estate unless it could, under the law of Missouri, be applied for the payment of expenses of administration. On the question of state law, they concluded that real estate of a decedent could not be sold for the payment of expenses of administration and the proceeds of land sold to pay

debts could not be lawfully used to pay expenses of administration. (See R. 8–9, 13, 15.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred—

In holding that the value of the real estate of a decedent in the State of Missouri should not be included in the measure of decedent's gross estate for the purpose of computing the Federal estate tax under the provisions of Section 402 of the Revenue Act of 1918.

SUMMARY OF ARGUMENT

I

Section 402 of the Revenue Act of 1918, relating to the computation of the value of the gross estate, should be construed to provide for the inclusion of the value of all real estate in the United States in which the decedent had an estate of inheritance in his own right at the time of his death. The provisions of this section are comprehensive and evidence a purpose to include all property owned by the decedent absolutely at the time of his death which could possibly be regarded as having undergone a taxable transfer by his death.

Subparagraph (a) provides that property shall be included "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." This language is obviously inartificial

and is loosely used. We submit that it was intended to define the character of interests to be included—i. e., those interests in property which from their nature are capable of being applied to the payment of charges against the estate and the expenses of administration and which are capable of transfer to the beneficiaries of the estate, in contrast to life interests, contingent remainders, property held by the decedent in trust for others, etc. Although at common law real property was not liable for the payment of either simple contract debts or administration expenses, most states by 1918 had statutes making real estate liable for these charges under different conditions, and, of course, real estate could be made subject to such payments either by statute or by specific provision in wills.

It is not reasonable to suppose that Congress, in enacting a law of general application throughout the United States, intended to discriminate in favor of the estates of decedents who owned real property in states which retained the common-law rule and against those whose real estate was in states which had modified it. It is doubtful whether the statute, if construed to require such discrimination, would not violate the constitutional requirement of geographical uniformity in excise taxes throughout the United States, and this construction is therefore to be avoided where another construction is possible.

This construction is also to be avoided because it would thwart the general purpose of the section and would lead to absurd results, i. e., the exclusion of the value of real estate in which the decedent owned the entire interest outright at the time of his death, in spite of the inclusion of the value of dower or curtesy interests of the surviving spouse, the inclusion of part of the value of real estate held by decedent and another in joint tenancy or as tenants by the entirety, and the inclusion of the value of the real estate which the decedent had transferred in contemplation of death.

The construction for which we contend is that which was adopted in practice by the Treasury Department from the time of the enactment of the Revenue Act of 1916, which was the first Act to provide for the estate tax, and this construction was also adopted in regulations promulgated by the Secretary of the Treasury. After the adoption of this settled practice, Congress reenacted the provisions in question and thus gave evidence of its approval of that practice. These considerations seem to be more persuasive than the fact that in 1921, after the decision of this Court in *United States* v. *Field*, 255 U. S. 257, the Commissioner changed his regulations to conform to what he then understood to be the effect of that decision. That case, we submit, is not decisive of the instant case.

Steedman v. *United States*, 63 C. Cls. 226, certiorari denied, 275 U. S. 528, is directly in point, and supports the above contentions.

II

Even if Section 402 should not be construed as broadly as we suggest above, it should be held to provide for the inclusion in the gross estate of those interests of the decedent in real estate which, under the law of the state in which it is situated, may be applied, either directly or indirectly, to defray expenses of administration of the estate.

The language of subparagraph (a) obviously can not be construed to require that the real estate, to be included, must actually be applied to the payment of expenses of administration. And it would be unreasonable to construe the language as requiring that the law of the state should permit its sale for expenses of administration under all circumstances. We submit that the strictest construction of which it is susceptible would be satisfied if the real estate could, as a practical matter, be applied, either directly or indirectly, to the payment of expenses of administration under any circumstances. The decision in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, supports this contention.

III

Under the law of Missouri, real estate of the decedent can, under some circumstances, be applied to payment of expenses of administration.

No statute permits real estate there to be sold merely to pay administration expenses. But an executor or administrator, upon application to the court, can obtain permission to sell real estate to

pay debts or legacies if the personal estate is insufficient. And when such a sale is made, the expenses of the sale and a commission on the proceeds of the sale given by statute to the executor or the administrator for making the sale are first payable out of the proceeds of the estate. This is an expense of administration. Moreover, it would seem that when a sale is made the proceeds may be applied for other expenses of administration. Ordinarily in Missouri expenses of administration have precedence over debts and legacies. Real estate may be sold to pay debts and legacies if the personal estate has been consumed by administration expenses; and consequently, as a practical matter, the real estate may be sold because of administration expenses. The payment of debts and legacies and the payment of administration expenses are thus very closely related. Moreover, a testator by express provisions of his will may subject real estate to payment of administration expenses.

ARGUMENT

I

SECTION 402 OF THE REVENUE ACT OF 1918, RELATING TO THE COMPUTATION OF THE VALUE OF THE GROSS ESTATE, SHOULD BE CONSTRUED TO PROVIDE FOR THE INCLUSION OF THE VALUE OF ALL REAL ESTATE IN THE UNITED STATES IN WHICH THE DECEDENT HAD AN ESTATE OF INHERITANCE IN HIS OWN RIGHT AT THE TIME OF HIS DEATH

Section 402 of the Revenue Act of 1918, with its six subparagraphs, designated as "(a)" through

"(f)," inclusive, is printed in the Appendix, pp. 29–30, *infra*. It provides:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

and to the extent of the interests and property designated in five other subparagraphs. These other subparagraphs provide for the inclusion of the interest of the surviving spouse as dower, courtesy, and the like; property of which the decedent has made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after his death; the interest of the decedent in property held jointly or by tenants by the entirety; property passing under a general power of appointment exercised by the decedent; and certain insurance on the decedent's life. The provisions are most comprehensive and evidence sedulous care to include in the gross estate all property which could be regarded as having undergone a taxable transfer by death. It is obvious that Congress intended to include real estate, inasmuch as the introductory sentence mentioned real estate and subparagraph (b) expressly provided for the in-

clusion of the interest "of the surviving spouse existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy." And we submit that an intention to exclude from the gross estate any real property absolutely owned by the decedent at the time of his death should not be imputed to Congress in the absence of explicit language to this effect.

The language of subparagraph (a), which the respondent and the courts below construed as operating to exclude all real estate in Missouri, is inartificial and is loosely used.[1] We contend that, for various reasons mentioned below, it should not be given the narrow interpretation adopted by the Circuit Court of Appeals in this case.

We submit that subparagraph (a) was intended merely to define the character of interests to be included, i. e., those interests in property which from their nature are capable of being applied to the payment of charges against the estate and the

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[1] Thus it provides that the property to be included must be "subject to distribution as part of his estate." The only property which is subject to *distribution* as part of an estate, in the accurate meaning of that word, is personal property. The Circuit Court of Appeals recognized this. (R. 11.) See also *Dinning* v. *Conn's Administrator*, 124 Ky. 623, 627; *Leakey* v. *Maupen*, 10 Mo. 368, 373; *Thomson* v. *Tracy*, 60 N. Y. 174, 180–181. Respondents did not argue in the court below that subparagraph (a) should have the effect of excluding all real estate, and the court below said: "Such a result plainly could not have been intended by Congress." (R. 12.)

expenses of administration and which are capable of transfer to the beneficiaries of the estate, in contrast to estates for the decedent's life, contingent remainders, property held by the decedent in trust for others, etc. It is notable that the conditions or descriptive words set forth in subparagraph (a) do not appear in any of the other subparagraphs of the section, although most of those subparagraphs relate to real, as well as to personal, property. If the interest is one which is normally or generally subject to the payments mentioned and is susceptible of transfer to the beneficiaries of the estate, we contend that it comes within the meaning of the language in question.

Although at common law real estate was not liable for the payment either of ordinary debts of the decedent or administration expenses, most states have statutes making real estate liable for these charges under different conditions. As appears from the compilation of statutes in Appendix B, pp. 41–46, *infra,* in 1920 (the year of the death of Harrelson), the statutes of sixteen states provided for the sale of real estate to pay administration expenses, and the statutes of twenty-two other states made provision for the sale of real estate to meet payment of such expenses after personal property had been exhausted. In the remaining ten states, the statutes appear to have made provision for the sale of real estate to meet the payment of debts, if the personal estate is insufficient, but not the payment of administration expenses. It should also

be borne in mind that wills often provide that real estate may be sold for the payment of administration expenses.

Nowhere in subparagraph (a) or in any other part of Section 402 is there express provision that the test as to whether any particular kind of property is to be included is to be found in the law of the state in which it is located. The general terms of the provisions of subparagraph (a) of Section 402 are in marked contrast to the explicit language of the provisions for deductions in Section 403 of the same Act, which provides that the value of the net estate shall be determined by deducting from the value of the gross estate *inter alia*—

> such amounts for funeral expenses, administration expenses, claims against the estate * * * as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered,

with certain designated exceptions. In view of this specific reference to state laws, the absence of specific reference to state law in Section 402(a) is especially significant.

We submit that Congress did not intend that the Commissioner, in computing the value of the gross estate, should be required to consult the statutes and the decisions of the state in which the real estate is located in order to determine whether or not the value of the real estate should be included in computing the estate tax. Real estate in Missouri is the same class of property as real es-

state in other states, and if it is not subjected to the payment of administration expenses it is only because the Missouri legislature has not seen fit so to provide. Under the construction adopted by the court below, it would seem that the legislature of any state at any time could remove all real estate within its borders from liability to the Federal estate tax.

It is not reasonable to suppose that Congress, in enacting a law of general application throughout the United States, meant to discriminate in favor of the estates of decedents who owned real estate in states which retained the common law rule as to the liability of real estate for administration expenses and against those whose real estate was in states which had modified that rule.

There is grave question whether the statute, if construed to require such discrimination, would not violate the constitutional requirement [2] of uniformity in excise taxes throughout the United States. The uniformity required by this clause is geographical; and it seems very doubtful whether its requirement would be met by a statute taxing real estate in some states while exempting the same class of property located in other states. *Knowlton* v. *Moore,* 178 U. S. 41, 106; *Patton* v. *Brady,* 184 U. S. 608, 622. It is an established principle

[2] Article I, Sec. 8, of the Constitution provides that "all Duties, Imposts, and Excises shall be uniform throughout the United States." The estate tax is an excise tax. *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349.

of statutory construction, as stated by this Court in *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408, that—

> where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

See also *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Lucas* v. *Alexander,* 279 U. S. 573, 577.

This Court in *United States* v. *Childs,* 266 U. S. 304, rejected a construction which would lead to a similar lack of uniformity as to interest allowable to the United States on income-tax payments, saying (p. 309):

> We are unable to concur. It makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the Government, 6%, in the middle West 8%, and on the Pacific coast 10%,—and abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation.

See also *Boston & M. R. R. Co.* v. *United States,* 265 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577, where it was said (p. 580):

> Under the logic of the fundamental and salutary rule of uniformity, unless a contrary intention clearly appears, statutes creating a system under which taxes are to be laid are generally, if not always, accepted as intending a system to work uniformly

> throughout the domain in which the law is to operate. Hence it follows that the argument that the force of an express provision of a federal statute should be controlled or abridged by a local state statute is wholly inadmissible.

Moreover, there is manifest incongruity in an interpretation which would tax dower and curtesy interests, real property held as joint tenant or tenant by the entirety, real property given away in contemplation of death, and real property passing under the exercise of a power of appointment, but would not tax real property held in fee simple.[3] A construction of a statute which leads to absurd results should be avoided. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *In re Chapman,* 166 U. S. 661; *Kohlsaat* v. *Murphy,* 96 U. S. 153.[4]

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[3] The Circuit Court of Appeals for the Eighth Circuit has held that a wife's statutory interest in her husband's estate under the Missouri law is required to be included in the gross estate. *United States* v. *Waite*, 33 F. (2d) 567, certiorari denied, 280 U. S. 608. The provision of subdivision (d) of Section 402 for including the value of the decedent's interest in property held in joint tenancy or as tenants by the entirety would seem clearly to apply to real estate regardless of whether or not the interest is subject to payment of administration expenses. See *United States* v. *Provident Trust Co.* (reported with *Tyler* v. *United States*), 281 U. S. 497.

[4] Even if the proper literal interpretation of the language were that for which respondents contend, the strict letter of the Act would have to yield to its evident spirit and purpose in order to give effect to the intent of Congress. *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, 360; *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 466, 505; *United States* v. *Burr*, 159 U. S. 78.

The construction for which we contend finds support in the practice of the Treasury Department. Articles 12 and 13 of its Regulations 37 (1919 revision), promulgated August 8, 1919, under the Revenue Act of 1918 (pp. 32–33, *infra*) showed clearly that the Department did not at that time construe subdivision (a) as a provision which might operate to exclude real estate possessed by a decedent from his gross estate. Article 12 declared that the provision "is designed to include all property interests of the decedent, of whatever character." Article 13 indicated that the only limitation as to the inclusion in gross estate of real estate owned by a decedent was as to real property situated outside of the United States, and expressly provided that with this exception real estate should be included "whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees," thus indicating that, whether the real estate was or was not subjected to the payment of administration expenses, it was to be included in the gross estate. Although the regulations, adopted by the Treasury Department under the corresponding provision of the Revenue Act of 1916 (Articles IV and V of Regulations 37; pp. 31–32, *infra*) were not very definite, they do not indicate that this section was construed as a limitation of the kind contended for by the respondent.

As a matter of practice, the Treasury Department taxed all real estate owned by decedents at

the time of death without regard to whether such real estate was or was not subjected to the payment of administration expenses. This contemporaneous and continued construction of the provision by the Department charged with its administration is entitled to great weight. *Brewster* v. *Gage,* 280 U. S. 327; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342. After the Treasury Department had followed this practice under the Revenue Act of 1916, Congress enacted Section 402(a) of the Revenue Act of 1918 and Section 402(a) of the Revenue Act of 1921, which were identical with Section 202(a) of the Revenue Act of 1916. This reenactment after the adoption of a settled practice under the Revenue Act of 1916 is evidence of legislative approval of that practice. *Brewster* v. *Gage, supra; National Lead Co.* v. *United States,* 252 U. S. 140.

After the decision in *United States* v. *Field,* 255 U. S. 257 (decided February 28, 1921), the Treasury Department in its regulations issued under the Revenue Act of 1921 laid down a test which it evidently conceived to be in accordance with the requirements of the *Field case.* Article 11 of Regulations 63 and Article 10 of Regulations 68 (pp. 34, 35, *infra*) provided that "the test which determines whether the value of a given interest is to be included" is "that the property, after death, shall be subject to: (1) payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the

estate." We submit that the independent and contemporaneous construction of the provision is entitled to more weight than the later interpretation based on what was conceived to be the effect of the decision in the *Field case.*

The new regulation is not very clear, but the Treasury Department has not construed it to require the exclusion of real estate in Missouri.[5]

The courts below placed considerable reliance upon certain language of this Court in the case of *United States* v. *Field,* 255 U. S. 257, concerning Section 202 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, which is identical with Section 402 (a) of the Revenue Act of 1918, *supra,* here involved. There this Court said (p. 262):

> The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inad-

[5] The claim for refund in the instant case was rejected on August 20, 1925. (R. 2.) The tax considered in *Steedman* v. *United States*, 63 C. Cls. 226, certiorari denied, 275 U. S. 528, was assessed in January, 1924, and November, 1924, and, of course, was collected. The tax considered in *Bartlett* v. *Commissioner*, 16 B. T. A. 811, was determined on March 9, 1926. We are informed that there are over fifty cases now pending in which the Commissioner has asserted the right to include real estate in Missouri under the different revenue acts.

> missible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

But the point actually decided in the *Field* case was that property passing under the execution of a testamentary power of appointment should not be included in the gross estate under Section 202 of the Revenue Act of 1916, which did not, as does Section 402 (e) of the Revenue Act of 1918 (*infra,* p. 30), include a specific provision taxing such a transfer. The case involved no question as to the application of state law or the meaning of the phrase "subject to the payment of the charges against his estate and the expenses of its administration." Consequently, this language does not support respondents' contention.

On the other hand, *Steedman* v. *United States,* 63 C. Cls. 226, certiorari denied, 275 U. S. 528, directly supports the above contentions of petitioner. In that case the court held that real estate in Missouri owned by the decedent at the time of his death should be included in computing the value of his gross estate under the provisions of Section 402 (a) of the Revenue Act of 1921, which is identical with the same section of the Revenue Act of 1918. We take issue with the contention of the respondents in their brief in opposition that this case has been repudiated by the Court of Claims in *Nyberg* v. *United States,* 66 C. Cls. 153, certiorari denied, 278 U. S. 646. The holding in that case was that a

widow's interest in her husband's estate under the Nebraska law was taxable under Section 402 (b) of the 1924 Act.

II

EVEN IF SECTION 402 SHOULD NOT BE CONSTRUED AS BROADLY AS WE SUGGEST ABOVE, IT SHOULD BE HELD TO PROVIDE FOR THE INCLUSION IN THE GROSS ESTATE OF THOSE INTERESTS OF THE DECEDENT IN REAL ESTATE WHICH UNDER THE LAW OF THE STATE IN WHICH IT IS SITUATED MAY BE USED—EITHER DIRECTLY OR INDIRECTLY—TO DEFRAY EXPENSES OF ADMINISTRATION OF THE ESTATE

The language of subparagraph (a) obviously can not be construed to require that the real estate, to be included, must actually be applied to the payment of expenses of administration. It would be unreasonable to construe the language as requiring that the law of the state should permit its sale for expenses of administration under all circumstances. We submit that the strictest construction of which it is susceptible would be satisfied if the real estate could, as a practical matter, be applied—either directly or indirectly—to the payment of expenses of administration under any circumstances.

Administration expenses, as a practical matter in the administration of an estate, are interwoven and connected with the payment of charges against the estate. The following language of the Board of Tax Appeals in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, 817–818, is apt:

> When we consider that the phrase "subject to the payment of the charges against

his estate" is joined with the phrase "and the expenses of its administration" in one condition, we fail to see why land in Missouri does not fully comply with this condition. The two are so closely related that we can not have the former without the latter, and when the former does exist, the land is certainly subject to the payment of administration expenses. The position of the petitioner would require not only that the two parts of the condition be treated as separate and distinct conditions, but also that the words "subject to" be construed to mean "liable to be sold for." But as we read the statute, we do not understand that it means more than that the property must be of such a nature and have such a relation to the decedent's estate that the burden of administering the estate is incident and subject thereto.

A line of reasoning which would lead to a similar result is that the word "and" between the words "subject to the payment of the charges against his estate" and "the expenses of its administration" should be given the meaning of "and/or", so that the phrase in question will read: "which after his death is subject to the payment of the charges against his estate and/or the expenses of its administration." It is common knowledge that the use of the words "and" and "or" in the English language is often not exact. It is also a philological fact that we have no single word to express the idea "and/or." Accordingly, the word "and" is fre-

quently used when the idea which is sought to be expressed is really "and/or." The expression "and/or" has not yet been used in the Federal taxing statutes. But we contend that the word "and" in the phrase now in question was used in a sense which would have been more accurately expressed by the expression "and/or," or more simply by the word "or."

It is true that this Court in the *Field case, supra,* said that the conditions of subparagraph (a) are—

> (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively.

With this statement we are in full accord. We do not contend that these three conditions should be read disjunctively. Our sole concern is with the requiremets of the second of these conditions, which requirements the Court did not say should be construed conjunctively.

In *United States* v. *Fisk,* 3 Wall. 445, 447, this Court said:

> In the construction of statutes, it is the duty of the court to ascertain the clear in-

> tention of the legislature. In order to do this, courts are often compelled to construe "*or*" as meaning "*and,*" and again "*and*" as meaning "*or.*"

See also *Long* v. *Palmer, Smith & Co.,* 16 Pet. 65, 69; *Union Ins. Co.* v. *United States,* 6 Wall. 759, 764; *Union Central Life Ins. Co.* v. *Skipper,* 115 Fed. 69, 72 (C. C. A. 8th); *Northern Commercial Co.* v. *United States,* 217 Fed. 33, 36 (C. C. A. 9th); *Dayton Brass Castings Co.* v. *Gilligan,* 267 Fed. 872, 879; Sutherland, Statutory Construction (2d ed.) Sec. 397.

III

UNDER THE LAW OF MISSOURI REAL ESTATE OF A DECEDENT CAN, UNDER SOME CIRCUMSTANCES, BE APPLIED FOR THE PAYMENT OF EXPENSES OF ADMINISTRATION

At common law real estate could not be sold for the payment of expenses of administration. The common law is in effect in Missouri, except as modified by statute. No statute permits real estate there to be sold merely to pay administration expenses.

But, under the laws of Missouri, real estate of a decedent can, under some circumstances, be applied to the payment of expenses of administration. An executor or administrator, upon application to the court, can obtain permission to sell real estate to pay debts and legacies if the personal estate is insufficient. Missouri Revised Statutes (1919), Sec. 141 (*infra,* p. 47). When such a sale is made, the

executor is entitled to a commission of 5% on the proceeds of the sale. Missouri Revised Statutes (1919), Sec. 220 (*infra,* p. 50). This commission and the expenses of the sale are entitled to priority over the payment of debts against the estate. Missouri Revised Statutes (1919), Sec. 224 (*infra,* p. 50.)

Although it is true that a sale of real estate can not be made to pay the expenses of administration alone, when a sale has been made the proceeds may be applied in substance for the payment of expenses of administration. Real estate may be sold to pay debts and legacies if the personal estate has been consumed by administration expenses, and consequently, as a practical matter, the real estate may be sold because of administration expenses. The Board of Tax Appeals, considering this question in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, 816, said:

> In the administration of an estate, among the expenses to be met before the payment of debts or legacies are administration expenses, and where there are debts or legacies to be satisfied, these administration charges will be paid out of the personal property before payment of debts or legacies from the real estate. But whether there will be considered sufficient personal property to satisfy the debts and legacies will be determined by taking into consideration the total liabilities for debts and legacies, together

with the amount due for administration expenses. And if there be not sufficient personalty to take care of all of these demands, but more than sufficient to take care of the administration expenses, resort will then be had to the realty to make up the deficiency. It may be said that under such circumstances administration expenses are being met out of the personal property and that the deficiency which is being met out of the realty relates only to debts and legacies, but it is undeniably true that the deficiency to be met out of the sale of realty is greater because the administration expenses have consumed a part of the personalty. By way of illustration, a man leaves only $10,000 worth of personalty, but also leaves $5,000 in real estate. His debts are $9,000, and the expenses of administration amount to $2,000. It is not believed that anyone would seriously question that under such circumstances real estate to the extent of $1,000 may and must be sold. Without the administration expenses no realty would be required to be sold. Whether we say that the administration expenses are paid out of personalty and the debts out of personalty and realty, or vice versa, would seem to be a mere choice of words and not material. The land can be sold only because the debt exists, but the sale is made on account of administration expenses in the same sense as it is of debts. * * *

Moreover, a testator by express provisions of his will may provide that real estate in Missouri shall be sold. When this is done there is, of course, an equitable conversion, so that real estate is treated from the time of the testator's death as though it were personal property (*Griffith* v. *Witten,* 252 Mo. 627), and the proceeds of the real estate are liable for the payment of administration expenses, as is other personal property. *Cf. Gilbreath* v. *Cosgrove,* 185 S. W. 1118. In such a situation real estate in Missouri is in fact subject to the payment of administration expenses.

The Missouri statutes and decisions on the question of the liability of real estate for the payment of administration expenses are examined and discussed in detail in Appendix C, *infra,* pp. 47–56. From this discussion we conclude that under the statutes of Missouri, when real estate is sold to meet the payments of debts or legacies the administration expenses should be satisfied from the proceeds prior to the satisfaction of the claims of creditors or legatees.

Accordingly we contend that real estate in Missouri satisfies the requirements of Section 402 (a) of the Revenue Act of 1918.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
WILLIAM T. SABINE, Jr.,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

OCTOBER, 1930.

APPENDIX A

UNITED STATES STATUTES, TREASURY DEPARTMENT REGULATIONS, AND CONGRESSIONAL COMMITTEE REPORTS

UNITED STATES STATUTES

Section 202 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778, provided:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by

the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Section 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098, provided:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at

any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Section 402 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278, and Section 302 (a) of the

Revenue act of 1924, c. 234, 43 Stat. 253, 304, are the same as Section 402 (a) of the Revenue Act of 1918 set out above.

Section 302 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70 (U. S. C. App., Title 26, Sec. 1094), provides:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *

TREASURY DEPARTMENT REGULATIONS

Articles IV and V of Regulations 37, promulgated October 10, 1916, under the Revenue Act of 1916, provided in part as follows:

> ART. IV. The gross estate of a decedent, as defined in section 202, includes:
>
> (1) The entire estate of every kind, real, personal, and mixed, tangible and intangible property, coming into the hands of executors or administrators, or such as would legally come into their charge if executors or administrators were appointed, and which property would be subject to charges against the estate, expenses of administration, and distribution to the heirs or legatees. This would include insurance, not payable directly to a beneficiary named in the insurance contract, but passing as a part of the administered estate. It would include also the good will of claimant's business, if such good will possessed an actual monetary value.
>
> (2) All property transferred by decedent during his lifetime, but in contemplation

of, or intended to take effect at, his death. * * *

(3) Decedent's share in joint bank accounts or in any other property owned by decedent jointly with another or with others as tenants in entirety. Only such part of such property as can be shown never to have been owned by the decedent can be excluded from his gross estate.

ART. V. In the case of property of a decedent whose estate has no executor or administrator, all the property and interests of the decedent, including the interests described in paragraphs 2 and 3 above, will be aggregated to determine the gross estate.

Articles 12 and 13 of Regulations 37 (1919 revision), promulgated August 8, 1919, under the Revenue Act of 1918, provide in part:

ART. 12. CHARACTER OF INTERESTS INCLUDED.—This provision is designed to include all property interests of the decedent, of whatever character. It is the commonest form of taxable transfer. As a basis for tax, there must be an actual, beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate. The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate. It consequently does not include a right which came into existence only after the decedent's death, such as a cause of action by statute for causing the death. The proceeds of such a cause of action should not be included in the gross estate, whether payable generally to the estate or to some

specified class of persons, such as the widow or children.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of a life estate in the decedent. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent. For rules as to valuing such annuities and illustrations, see Article 20.

ART. 13. SPECIFIC PROPERTY TO BE INCLUDED.—Real property owned by the decedent, when situated in the United States, should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Real property not situated in the United States should not be included, whether the decedent was a resident or nonresident. Where the decedent was a resident, all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, so much of his personal property as was actually situated in the United States at the time of his death should be included. For further discussion of the rules relating to the estates of nonresidents, see Article 60.

* * * * *

Regulations 37 (1921 revision), promulgated January 31, 1921, under the Revenue Act of 1918,

made no change in Articles 12 and 13 as set out above.

Articles 11 and 12 of Regulations 63, promulgated July 27, 1922, under the Revenue Act of 1921, provide:

> ART. 11. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate.
>
> The test which determines whether the value of a given interest is to be so included, pursuant to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to: (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate.
>
> * * * * *
>
> ART. 12. SPECIFIC PROPERTY TO BE INCLUDED.—The value of all real property situated in the United States, and owned by the decedent at the date of his death, should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. The value of real property situated outside the United States should not be included, except as otherwise provided in Articles 55, 56, and 57, where deductions from gross estate are claimed and the decedent was a nonresident. Where the de-

cedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, if deductions are claimed. (See Arts. 55, 56, and 57.) As to the situs of the personal property of nonresident decedents, see Article 53.

* * * * *

Articles 10 and 11 of Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, are the same, so far as here material, as Articles 11 and 12 of Regulations 63, set out above.

Articles 10 and 11 of Regulations 70 (1926 edition), promulgated August 24, 1926, under the Revenue Act of 1926, provide in part as follows:

ART. 10. CHARACTER OF INTERESTS INCLUDED.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

Where the decedent died prior to 10.25 a. m., Washington, D. C., time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926 is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribu-

tion as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

ART. 11. SPECIFIC PROPERTY TO BE INCLUDED.—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where the decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the personal property of nonresident decedents, see Article 50.

Articles 10 and 11 of Regulations 70 (1929 edition) promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928, are the same as Articles 10 and 11 of Regulations 70 (1926 edition) set out above.

CONGRESSIONAL COMMITTEE REPORTS

Revenue Act of 1916

In the report of the Committee on Ways and Means to the House of Representatives (House Report No. 922, 64th Cong., 1st Session) it was said (p. 5):

> Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.

The paragraph set out above was also quoted (p. 3) in the Report of the Committee on Finance to the Senate (Senate Report No. 793, Part 1, 64th Congress, 1st Session).

Revenue Act of 1918

In the report of the Committee on Finance to the Senate (Senate Report No. 617, 65th Congress, 3d Session) it was said (pp. 41–42):

> This form of taxation has now been in operation for about two years and sufficient opportunity has been afforded those engaged in administering the law to observe and report to Congress the effect of the existing law and suggestions for amendments which will bring out more clearly the intention which Congress desired to prevail at the time of the original imposition of an estate tax.
>
> * * * * *
>
> Section 402 of this bill, which takes the place of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to

wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.

It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

There has also been included in the gross estate the value of property passing under a general power of appointment. This amendment as well as that preceding is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax.

The gross-estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

In the report of the Committee on Ways and Means to the House (House Report No. 1, 69th Congress, 1st Session), it was said (p. 15):

> SECTION 302. Under existing law the gross estate is determined by including the interest of the decedent at the time of his death in all classes of property which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. In the interest of certainty it is recommended that the limiting language above referred to shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property.

APPENDIX B

SUMMARY OF STATE STATUTES ON LIABILITY OF REAL ESTATE FOR ADMINISTRATION EXPENSES *

I

States making statutory provision for the sale of real estate to pay administration expenses

Arizona:

Revised Statutes (1913), Secs. 919, 921.

California:

Code of Civil Procedure (1915), Secs. 1516, 1536, and 1537 as amended by *Statutes and Amendments to the Code,* 1919, p. 1177.

Connecticut:

General Statutes (Revision of 1918), Sec. 5015. See also *Candee* v. *Candee,* 87 Conn. 85; *Phelan* v. *Elbin,* 84 Conn. 208.

Maine:

Revised Statutes (1916), Chap. 76, Secs. 1, 20–21.

Montana:

Revised Code (1907), Secs. 4799–4800. *Plains L. & I. Co.* v. *Lynch,* 38 Mont. 271, 283.

New York:

Parson's Code, Civil Procedure, Annotated (1920), Secs. 2701–2711.

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* For the sake of uniformity the statutes referred to below are those which were in force in the various states during the year 1920, the year involved in the instant case.

North Dakota:

Compiled Laws (1913), Annotated, Vol. II, Secs. 8771–8780.

Oklahoma:

Revised Laws (1910), Annotated, Vol. 2, Article VIII, Sec. 6360.

South Dakota:

Revised Code (1919), Vol. I, Sec. 3419.

Texas:

Vernon's Sayles Texas Civil Statutes (1914), Vol. 2, Arts. 3489–3507.

Utah:

Compiled Laws (1917), Chap. 10, Sec. 7677.

Vermont:

General Laws (1917), Chap. 151, Secs. 3342–3356.

Virginia:

Code (1919), Secs. 5390, 5395.

Washington:

Remington's Compiled Statutes (1922), Vol. I, Secs. 1494–1504.

West Virginia:

Code (1916), Chap. 85, Sec. 25, Chap. 86, Secs. 3–8.

Wyoming:

Compiled Statutes (1910), Chap. 377, Sec. 5637.

II

States making statutory provision for the sale of real estate to meet the payment of administration expenses after the personal property is exhausted

Arkansas:

Digest of Statutes, Kirby & Castle (1916), Secs. 190–193. No sale will be ordered to

Arkansas—Continued.

meet the payment of administration expenses alone unless the expenses were incurred in administering the estate to pay debts due personally by the decedent. *Flowers* v. *Reece,* 92 Ark. 611; *Collins* v. *Paepcke-Leicht Lumber Company,* 74 Ark. 81; *Mays* v. *Rogers,* 52 Ark. 320.

Colorado:

Colorado, Compiled Laws (1921), Chap. III, Secs. 5296–5324, 5331. *Pinnacle Co.* v. *Popst,* 54 Colo. 451.

Delaware:

Revised Code (1915), Secs. 3417, 3427, 3432.

Florida:

Revised General Statutes (1920), Vol. II, Secs. 3756, 3757.

Idaho:

Compiled Statutes (1919), Vol. II, Chap. 279, Sec. 7602.

Illinois:

Smith's Illinois Revised Statutes, Auth. Ed., 1921, Chap. 3, Secs. 99–111.

Indiana:

Burns's Annotated Statutes (1919), Vol. II, Secs. 2848, 2848 (a).

Iowa:

Compiled Code of Iowa (1919), Secs. 7847, 7872.

Kansas:

Revised Statutes (1923), Chap. 22, Art. 8, Secs. 22–801.

Louisiana:

Saunders' Revised Civil Code, Second Edition, Secs. 1051, 1058, 1164–1166. See also *Suc-*

Louisiana—Continued.

cession of Barry, 130 La. 401; *Rizzotto* v. *Grima,* 164 La. 1, 113 So. 658; *Succession of Ibox,* 144 La. 813, 81 So. 326; *Succession of Trahan,* 118 La. 762, 43 So. 400.

Maryland:

Bagby's Annotated Code (1913), Art. 93, Secs. 290–293.

Massachusetts:

General Laws (1921), Vol. II, Chap. 202, Sec. 1.

Michigan:

Howell's Statutes (1914), Title XXVI, Chap. 301, par. 11231–11244.

Mississippi:

Hemingway's Annotated Code (1917), Secs. 1721, 1735–1737.

Nebraska:

Revised Statutes (1913), Art. X, Secs. 182–184, 190, 193.

Nevada:

Revised Laws (1912), Vol. 2, par. 5985–5997.

North Carolina:

Consolidated Statutes, Annotated (1919), Vol. I, Chap. 1, Sec. 74.

Ohio:

General Code, Page's Compact Edition, Vol. 3, Sec. 10774.

Oregon:

Olson's Laws (1920), Vol. I, Title XVI, Chap. VII, Secs. 1249, 1252.

Pennsylvania:

Statutes (1920), Sec. 8473.

Rhode Island:

General Laws (1923), Sec. 1, par. 5338.

Wisconsin:

Statutes (1919), Vol. II, Chap. 164, Secs. 3822, 3835.

III

States making statutory provision for the sale of real estate to meet the payment of debts if personal estate is insufficient but not for the payment of administration expenses

Alabama:

Civil Code (1907), Vol. 2, Secs. 2619–2620. *Beadle* v. *Steele,* 86 Ala. 413; *Taylor* v. *Crook, Admr.,* 136 Ala. 354.

Georgia:

Park's Annotated Code (1914), Vol. III, Sec. 4026. See also *Beatty* v. *Stapleton,* 110 Ga. 580.

Kentucky:

Carroll's Codes (1919), Title X, Sec. 429.

Minnesota:

General Statutes (1913), Secs. 7336, 7344.

Missouri:

See elsewhere in brief.

New Hampshire:

Public Laws of New Hampshire, Commissioner's Report, 1925, Chap. 300, Sec. 17.

New Jersey:

Compiled Statutes, Vol. 3, Orphans' Courts, Secs. 81–86. But it has been held that the statutory provision for the sale of land to pay debts includes by implication authority to sell to pay administration expenses. *Personette* v. *Johnson,* 40 N. J. Eq. 173, 179.

New Mexico:

Statutes, Annotated, Codification (1915), Chap. LXXXVIII, Secs. 332–347, pp. 1262–1265.

South Carolina:

Code of Laws (1912), Vol. I, Sec. 3637.

Tennessee:

Shannon's Code (1917 Ed.), Secs. 3985, 3991–3998, 4000–4003, 4077–4081.

APPENDIX C

Missouri Statutes and Discussion of Missouri Statutes and Decisions

Revised Statutes of Missouri, 1919

Sec. 141. *Sale of lands to pay debts.*—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts; and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person.

Sec. 142. *Petition and exhibits.*—Such petition shall be accompanied by a true account of his administration, a list of debts due to and by the deceased and remaining unpaid, and an inventory of the real estate and of the remaining personal estate, with its appraised value, and all the other assets in his hands, and the whole to be verified by the affidavit of the executor or administrator.

Sec. 145. *When creditor, etc., may make application.*—If such executor or administrator do not make such application, any creditor or other person interested in the estate may make such application, giving twenty days' notice to the executor or administrator. On such application the court shall order publication and notice, as provided in preceding sections.

Sec. 146. *Duty of executor or administrator in such case.*—Every such executor or administrator,

on or before the first day of the term of the court at which he is notified that such application will be made, shall file with the clerk of the court perfect accounts, lists and inventories made out and verified as those required to accompany a petition by himself. If such executor or administrator fail to comply with this section, the court shall compel him to do so by attachment.

SEC. 147. *Lien of judgment or attachment, how stated.*—If such real estate be bound by the lien of a judgment or attachment, the executor, administrator or creditor shall state that fact in his petition, the date and amount of the judgment, and the name of the person in whose favor the same was rendered, and the date of the service of the attachment, the amount claimed thereunder, and the name of the person prosecuting the same.

SEC. 148. *Id. Where there are several such liens.*—If such real estate be bound by the lien of several judgments or attachments, or both, the executor, administrator or creditor shall state that fact in his petition, the dates and amounts of such judgments, and the dates of serving, and the amounts claimed by such attachments, and the names of the persons in whose favor the same were rendered or are prosecuted.

SEC. 149. *The proceeds of sale, how applied—priority of liens.*—The proceeds of the sale of such real estate shall be first applied to the payment of such judgments and attachments, according to their priority of lien, and the residue of such proceeds, if any, shall become assets in the hands of the executor or administrator, to be administered according to law.

SEC. 165. *Court may order sale of its own motion, when—how conducted.*—If, upon the settlement of accounts of any executor or administrator, it appears that the personal estate is not sufficient to pay the debts and legacies, the court may make such order as it may think necessary for sale of the real estate for that purpose, and such order of sale may be made by the court after the filing of any semiannual or annual settlement, and the sale shall be conducted and the same proceedings had in relation thereto as is provided in articles I to XIII, inclusive, of this chapter in relation to the sale of real estate for the payment of debts upon the petition of the executor or administrator, creditor, or other person interested.

SEC. 181. *Demands, how divided.*—All demands against the estate of any deceased person shall be divided into the following classes:

I. Funeral expenses.

II. Expenses of the last sickness, wages of servants and demands for medicine and medical attendance during the last sickness of deceased; also reasonable cost of tombstone if allowed by court.

III. All debts, including taxes due the state or any county or incorporated city or town; and it shall be the duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance: *Provided,* that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court.

IV. Judgment rendered against the deceased in his lifetime, and judgments rendered upon attach-

ments levied upon property of the deceased during his lifetime; but if such judgment shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid as provided in sections 147, 148, 149, 150, 151, 152, 153, 154, 155, without reference to classification, except the classes of demands mentioned in the first and second subdivisions of this section shall have precedence of such judgments.

V. All demands, without regard to quality, which shall be legally exhibited against the estate within six months after the date of the granting of the first letters on the estate.

VI. All demands thus exhibited after the end of six months and within one year after the date of the granting of the first letters on the estate.

SEC. 220. *What disbursements and compensation allowed—administrator and surviving partner administering.*—In all settlements of executors or administrators the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate, also a reasonable cost for a surety company bond, if the court deems it just and proper under all the circumstances connected with the estate to allow cost of such bond, and as full compensation for their services and trouble a commission of five per cent. on personal property and on money arising from the sale of real estate; and that a surviving partner or partners, in administering upon the effects of the copartnership, shall be allowed a commission of three per cent. on the

interest of the deceased partner for like services and trouble.

SEC. 224. *Payment of claims—how ordered upon settlement.*—At every settlement, or at any time thereafter, when the best interests of the estate require it, the court shall ascertain the amount of money of the estate which has come to the hands of such executor or administrator from all sources, and the amount of debts allowed against such estate; and if there be not sufficient to pay the whole of the debts and expenses of administration, the money remaining after paying the expenses of administration shall be apportioned among the creditors according to the provisions of this chapter; and the court shall order that such executor or administrator pay the claims allowed by the court according to such apportionment, reserving apportionments made on claims which remain undecided until decision be had thereon.

DISCUSSION OF MISSOURI STATUTES AND DECISIONS

In general, the real estate of a decedent in Missouri descends to the heirs and does not come into the possession of the administrator for any purpose. *Hall* v. *Bank,* 145 Mo. 418; *St. Louis Nat. Bank* v. *Field,* 156 Mo. 306; *State* v. *Holtcamp,* 245 Mo. 655; *Dildine* v. *De Hart,* 293 Mo. 393. Section 141 of the Revised Statutes of Missouri (p. 47, *supra*) provides for the sale of real estate to meet the payment of debts and legacies only, and provides for such sales only where there is not sufficient personal property to meet the payment of debts and legacies. There is no statutory provision authorizing the sale

of real estate to meet the payment of administration expenses alone, and the Missouri courts have shown no disposition to construe the term "debts" broadly but have commonly held that the probate court can not direct a sale of real estate except for the payment of the debts of the deceased. *Chambers' Adm.* v. *Wright's Heirs,* 40 Mo. 482; *Dildine* v. *De Hart, supra; Langston* v. *Canterbury,* 173 Mo. 122. It has been held that where there are no debts real estate can not be sold merely for the purpose of meeting the payment of administration expenses. *Farrar* v. *Dean,* 24 Mo. 16; *Presbyterian Church* v. *McElhinney,* 61 Mo. 540; *Elstroth* v. *Young,* 94 Mo. App. 351; *Teverbaugh* v. *Hawkins,* 82 Mo. 180.

The question as to whether, when a sale has been made to meet the payment of debts, the proceeds of the sale may be used to meet the payment of administration expenses is one upon which the Missouri decisions are not entirely clear. Section 149 of the Code (*supra,* p. 48) apparently directs that the proceeds of the sale after being first applied to the payment of specific judgments and attachments shall be assets in the hands of the executor or administrator to be administered according to law. Section 181 of the Code (*supra,* pp. 49–50) classifies "demands" against the estate of a decedent and provides for the order of their payment. Administration expenses as such are not specifically mentioned in Section 181 and it has been held that that section has no application to administration expenses which are allowed by the court and are not

"demands" within the meaning of the section. *Crow* v. *Lutz,* 175 Mo. App. 427; *Thompson* v. *Thompson,* 217 S. W. 863.

By Section 220 of the Revised Statutes (*supra,* p. 50) it is provided that in all settlements of an executor or an administrator the court shall allow all disbursements and appropriations made by its order, funeral expenses, expenses of leasing real estate, legal advice and service, collecting and preserving the estate, "and as full compensation for their services and trouble a commission of five per cent. on personal property and on money arising from the sale of real estate." The Missouri courts have followed the plain terms of this section and held that an administrator is entitled to a commission of five per cent on the proceeds of land sold to pay debts. *Crenshaw* v. *Bentley,* 31 Mo. App. 75.

The priority of the payment of administration expenses is recognized in Section 224 (*supra,* p. 51), which directs that at every settlement the court shall ascertain the amount of money in the hands of the executor or administrator from all sources and the amount of debts, and if there be not a sufficient amount to pay the whole of the debts and the expenses of administration, the money remaining after the payment of the expenses of administration shall be apportioned among the creditors.

From these provisions it would seem to follow as a matter of course, that while real property in Missouri is not primarily subject to sale for the payment of administration expenses such property

would become liable in cases where a decedent died owing debts and his estate consisted solely of real property. This was the view of the Board of Tax Appeals in the *Bartlett case, supra,* 16 B. T. A. 811.

In the case of *Elstroth* v. *Young,* 94 Mo. App. 351, the administrator paid to creditors out of the personalty $968 of a total of $1,034 without deducting first the 5% commission or other administration expenses. Later certain proceeds from a sale of realty came into his hands. The court in an earlier proceeding decreed that such proceeds should be distributed to creditors. *Elstroth* v. *Dickmeyer,* 88 Mo. App. 418. The administrator deducted his commission, the general administration expenses, and the expenses attendant upon the sale of realty and distributed the balance. Although the court recognized the rule that real property can not be sold solely to meet the payment of administration expenses, it sustained the distribution. Manifestly, of the two funds it was immaterial from which the deduction is taken, and this is the real effect of the court's decision. It seems clear that in any case where real estate is sold to pay debts, the expenses of the sale and the executor's commission allowed under Section 220 would be paid from the proceeds. To this extent at least the real estate is subject to the payment of administration expenses.

Similarly, in *Howell* v. *Jump,* 140 Mo. 442, it was held that where there are bona fide debts and a sale of real estate was regularly made to pay them, it could not subsequently be set aside because the land

brought only enough to pay the costs of administration. The court said (p. 457):

> The court therefore had jurisdiction to order the sale and the purchaser was not bound to bid an amount which would pay the debts or to see that the money paid was properly applied.

The respondents in their brief in opposition to the petition for certiorari have intimated that this language is equivalent to a statement that the proceeds of the sale had been misapplied. On the other hand, the Court of Claims in the *Steedman case, supra*, relied upon the *Jump case* as authority for the principle that the proceeds from the sale of real estate ordered to meet the payment of debts might properly be applied to the payment of administration expenses. It seems doubtful whether the language used supports either construction.

The Circuit Court of Appeals in the instant case reached the conclusion that no portion of the proceeds of a sale of real estate could be applied to the payment of administration expenses by relying upon the cases of *Ritchey* v. *Withers*, 72 Mo. 556; *Elstroth* v. *Young, supra; In re Estate of Lloyd*, 44 Mo. App. 670; *In re Motier's Estate*, 7 Mo. App. 514. It is true that these cases contain certain general expressions which tend to support the Circuit Court of Appeals' conclusion, but none of them involved the question whether administration expenses as well as debts should be paid from the proceeds of a sale of realty ordered to meet the

payment of debts. The *Lloyd case* and the *Motier case* both deal with the widow's statutory allowance out of personalty and hold that such an allowance could not be made out of the proceeds of a sale of realty. This result has since been changed by statute, Missouri Laws, 1921, p. 111. The *Withers case* also involved the widow's allowance and in addition allowances for improvements and repairs to real estate which are not administration expenses. *Langston* v. *Canterbury,* 173 Mo. 122. *The Elstroth case,* for reasons which have previously been given, tends to support the Government's contention.

In none of the cases cited did the Missouri courts attempt to construe the provisions of Section 224 of the Revised Statutes. It thus appears that the Missouri courts have not definitely settled this issue and that this Court is free to make its own interpretation.

It is submitted that the only reasonable construction of Section 224 in conjunction with Sections 141, 149, and 220, is that while real estate in Missouri can be sold only to meet the payment of debts or legacies, when it is sold for that purpose, the administration expenses should be satisfied from the proceeds prior to the satisfaction of the claims of creditors or legatees. In that sense real estate in Missouri fully satisfies even the strictly literal requirements of Section 402 (a).

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